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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

(5)

No. 87-958

Commonwealth of Pennsylvania, et al, Petitioners

v.

Equal Employment Opportunity Commission and
Lieutenant Otto J. Binker

REPLY BRIEF FOR COMMONWEALTH, PETITIONER, TO BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Petitioners, the Commonwealth of Pennsylvania, Pennsylvania State Police and the Commissioner of the Pennsylvania State Police, submit this reply to the briefs of Respondents in opposition to the petition for a writ of certiorari.

ARGUMENT

Respondents Equal Employement Opportunity Commission (EEOC) and Lieutenant Binker have raised two arguments in opposition to the grant of certiorari. First, they claim that this case is primarily factual and unworthy of this Court's review because the Third Circuit did no more than overturn a district court's factfinding as clearly erroneous. Second, they claim that statutory developments have made the question, and circuit conflict, presented by this case unimportant. Both these claims are disingenuous.

1. At the district court level, this case certainly was primarily one of fact. The case involved eighteen days of testimony, 114 exhibits, 2319 pages of transcripts. The district court made sixty detailed findings of fact. Noticeably absent from the Third Circuit opinion, however, is any discussion of the evidence except in the greatest generalities. The Court of Appeals is not a place for factfinding. See Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 856 (1982) (Court of Appeals may not reverse trial court for improperly weighing evidence). If the Third Circuit truly wanted to reverse because the district court had improperly weighed the evidence, it had at least an obligation to provide a detailed discussion of that evidence.

Rather than weighing the evidence, the Third Circuit seized on undisputed factual issues--as the court itself noted (7a) and as the EEOC agrees (Brief for the Federal Respondent in Opposition 4). The parties do not dispute that the Commonwealth presently lacks specific, quantitative, minimum physical fitness standards that it requires younger troopers to meet. The question for this court is whether such standards are required. The Respondents, and the court below, appear to believe that a reasonably necessary job qualification can exist only in the form of specific, minimum standards (or "requirements" as the EEOC puts it). But no such standards have been present in myriad other age discrimination cases,

in which other circuits have held for the defendant./1

As we explain in our petition, no such standards should be necessary: (1) because the Commonwealth has no feasible way to test for the presence or absence of these standrds, and (2) because specific minimum fitness standards would represent an arbitrary oversimplification of the Commonwealth's need for physically capable state police. The evil raised by the Respondents and the court below is selective, discriminatory enforcement of fitness qualifications. But no selective enforcement of fitness qualifications occurs if an employer requires the retirement of over-aged officers because those officers, on the whole, are far less capable than younger of officers of maintaining fitness characteristics reasonably necessary for the job.

Furthermore, the absence of a specific, quantitative, fitness requirement does not imply the absence of non-quantitative fitness qualifications. The district court specified those qualifications in this case, inter alia, as the aerobic capacity to pursue victims, the strenth to

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1. See e.g., EEOC v. City of East Providence, 798 F.2d 524 (1st Cir. 1986) (discussed in the petition at 12); Ievolino v. Delta Air Lines, INc., 796 F.2d 1408 (11th Cir. 1986) (upholding age requirement for flight engineers without mention of fitness standards); EEOC v. Missouri Highway Patrol, 748 F.2d 447 (8th Cir. 1984) (discussed in the petition at 13-14), cert. denied, 474 U.S. 828 (1985).

disengage automobiles or to drag victims from dangerous situations, the reflexes to handle firearms and automobiles, and the freedom from disabiling disease that would compromise an individual's ability to perform under stress (17a). As we discussed in the petition at 11 n.7, the Commonwealth makes many efforts, short of individualized testing, to assure the physical fitness of officers below retirement age. Any claim, therefore, that the Commonwealth simply failed to identify fitness qualifications or that the Commonwealth makes no attempt to assure that officers remain fit is unsupported by the record or the district court's findings. And while putting numbers to these fitness qualifications is somewhat arbitrary, the district court found that the lack of strength and aerobic capacity and relatively high likelihood of silent heart disease make officers over sixty sufficiently less capable of meeting these qualifications to justify age as a BFOQ.

Indeed, far from a factual case, Respondents can muster only one statement in the Third Circuit opinion that even approaches the factual. The Third Circuit noted that the record "suggests" that most younger officers did not possess the requisite fitness qualifications (9a)./2 This is an inaccurate presentation of the record and the Third Circuit noticeably did not rest its opinion upon this "finding." But even the relevant

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2. This observation alone vitiates the EEOC's claim that no qualifications existed. Officers could only fail to meet qualifications if qualifications exist.

arguments on this point presented to the Third Circuit by the EEOC point to the legal, not factual, significance of this case.

To argue that under-aged troopers lacked fitness qualifications, the EEOC relied on test results of different aged state troopers./3 The tests had consisted of different components, and as the EEOC argued to the Third Circuit, many officers under age sixty had problems with two components, the shot put and obstacle course. But the officers highlighted by the EEOC as having such difficulties were primarily officers over aged forty and themselves protected by the Age Discrimination Act (Brief of the EEOC before Court of Appeals at 11)./4 Furthermore, their abilities declined enormously between ages forty and sixty.

In essence, therefore, the EEOC argued that sixty could not serve as a mandatory retirement age because many troopers approaching that age would suffer from similar infirmities. That

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3. The EEOC had argued before the district court, and the district court had agreed, that these test results were invalid because of testing methodology (26a-27a). Because these test results formed the basis of the EEOC's claim that younger officers did not meet the desired qualifications, the EEOC's claim, and the Third Circuit's suggested finding, lack even minimal evidentiary support.

4. The other group that failed some of the test components consisted of women.

observation is obvious. Sixty is not a magical, fitness turning point. The significant fact is not that some officers under aged sixty failed to meet all the desired fitness traits but that the ability of officers as a whole to meet desired fitness traits declines enormously by age sixty./5 It is the over-aged officers' likely deviation from the desired fitness traits that makes their employment a danger to public safety.

Under the EEOC's analysis, Pennsylvania could probably establish a mandatory retirement age of forty, but not of sixty. The evidentiary argument made by the EEOC therefore only underscores the reasons not to require an employer to establish arbitrary, minimum physical fitness standards. Far from protecting the over-aged, the EEOC analysis provides an incentive for harsher treatment of several categories of workers under a mandatory retirement age: those approaching the retirement age, the disabled, in some cases, women. As the district court observed in EEOC v. New Jersey, 631 F. Supp. 1506, 1509 (D.N.J. 1986), sum. aff'd, 815 F.2d 694 (3d Cir. 1987), "it comes with some ill grace for the EEOC in the course of raising the rights of one group to suggest that others should be precipitously discharged."

II. The EEOC also argues that the Age Discrimination in Employment Amendments of 1986,

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5. As the EEOC admitted in its brief to the Third Circuit, no officers over age sixty passed all the components of the test even when test results were discounted by 25%.

Pub. L. No. 99-592, 100 Stat. 3342, § 3 (codified at 29 U.S.C.A. § 623(i) & note (West Supp. 1987)), makes the circuit conflict in this case "a matter of litle continuing importance" (EEOC's Br. at 8).

This argument is false for three reasons. First, the issue at stake in this case is a fundamentally important, generic, BFOQ issue that does not turn on its law enforcement context. The EEOC did not, on appeal, contest the objective evidence used to show that physical fitness requirements were reasonably necessary. Nor did the EEOC take issue with the district court's conclusion that individualized testing was impractical. All the EEOC contended was that Pennsylvania could not rely on the objectively reasonable fitness qualifications because it did not quantify those qualifications into particular, minimum standards and make meeting those those standards a requirement of employment. Thus, none of the issues particular to law enforcement or firefighting are present. Instead, the issue in this case is whether an employer that wishes to maintain a mandatory retirement age must "implement and enforce" (8a) arbitrary minimum standards of fitness.

Second, Congress is not studying the issue presented by this case. The Act directs the EEOC to study whether tests can validily measure the ability of law enforcements officers and firefighters to perform their jobs, and to propose guidlines for such tests if feasible. Pub. L. No. 99-592 § 5, 100 Stat. 3343. These instructions, which presume the reasonable necessity of physical fitness qualifications and which go only to prong two of the BFOQ test, again are not at issue in this case. Far from hindering Congress'

analysis, Congress would presumably benefit from having this important, hidden issue raised for public attention.

Finally, the EEOC's conduct in relentlessly pursuing cases of this kind belies its claim of unimportance. In at least six ongoing cases cited in the Petition at 21, in this case, and in at least five other decided circuit court opinions,/6 the EEOC has made the necessity for specific minimum employment standards a focus of its charges in law enforcement or firefighting cases. Because the Act does not apply to acts brought before its effective date, January 1, 1987, law enforcement officials face millions of dollars in potential liability for lacking these specific, minimum standards. Even while discouraging this Court's review, the EEOC is attempting to establish long-term precedents for the determination of BFOQ's, which will make mandatory retirement ages difficult, if not impossible, to defend.

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6. See EEOC v. City of East Providence; EEOC v. New Jersey, 631 F. Supp. 1506 (D.N.J. 1986), sum. aff'd, 815 F.2d 694 (3d Cir. 1987) (the Third Circuit errenously stated in this case that the defendants there had fitness standards in place); EEOC v. Missouri Highway Patrol; Heiar v. Crawford County, 746 F.2d 1190 (7th Cir. 1984), cert. denied 472 U.S. 1027 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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